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ABSTRACT

In requesting after action reports--Pentagon-prepared summaries of interviews between reporters and Pentagon officials--investigative reporter Jack Taylor both aroused Pentagon opposition and created a rift between the Pentagon press corps and outside reporters. To investigate whether the full-time Pentagon press corps was reporting as aggressively as he felt it should on the U.S. military, Taylor filed a Freedom of Information (FOI) Act request with the U.S. Army for all copies of after action reports written during the previous six months. When this request was denied, he filed around 2,500 additional requests with 50 agencies, most of which were denied under two exemptions to the FOI Act: agency memoranda and material related to journalists' work in progress. In addition to causing heated debate among journalists, Taylor's efforts led to the Pentagon's discontinuance of required after action reports. While no longer required, the practice continued unabated. Taylor never completed his investigation. (MM)

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SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
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PENTAGON AFTER ACTION REPORTS: THE JACK TAYLOR DEBATE

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FREEDOM OF INFORMATION CENTER REPORT NO. 478

This report was written by Stan Abbott, an instructor and master's degree candidate at the University of Missouri School of Journalism.

Investigative reporter Jack Taylor spent the early months of 1980 interviewing Pentagon officials, visiting military bases and combing through defense reports — many secured through Freedom of Information Act requests. His work, which exposed military ill-preparedness, appeared in a series of articles in the **Daily Oklahoman** in the summer of 1980.

During his research, Taylor noticed that a Pentagon public affairs officer would always attend interviews between a reporter and a defense official. The public affairs officer, he discovered, often would tape the proceedings and prepare a report of what questions were asked and answered during the interview. These were "after action reports," a Pentagon practice that began with the administration of John F. Kennedy. At that time, Defense Secretary Robert S. McNamara initiated an unwritten policy to monitor what the press was asking and what officials were saying.

For Taylor, himself an Army Reserve officer, the after action report was not a disturbing practice. "It didn't bother me. I didn't object," Taylor said. "I knew what they were doing. It was standard operating procedure."[1]

But the common practice led to an uncommon idea on Taylor's part. In the fall of 1980, after his series, "Unprepared," had been published, Jerry Uhrhammer, president of Investigative Reporters and Editors, asked the Oklahoma City reporter to discuss military coverage and investigation at the IRE's convention in the spring of 1981.

The invitation sparked an idea that had occurred to Taylor during his Pentagon interviews. "I wondered if the military was being reported as aggressively as it should be by the press who covers the Pentagon on a full-time basis," Taylor said. He had become intrigued with policies of the military's public affairs departments and the information they were collecting. "I thought it would make a good possible story."[2]

He decided the after action reports — something even some Pentagon reporters apparently did not know about — might provide insight into the relationship between the military and the press corps. On Nov. 10, 1980, Taylor filed an FOIA request with the U.S. Army asking for copies of all after action reports written the previous six months by Army public affairs officers.

In his letter to the IRE accepting the invitation to appear at its national convention, Taylor explained his FOIA requests: "The documents might provide an insight into the Army's perceptions of the press." Specifically, he wanted to know whether the military was giving priority or special treatment to the press corps that covered the Pentagon. Taylor also wanted to discover if public affairs officers were adding their own assessments and impressions of the interviews they were reporting to their superiors.

Ten days after Taylor's FOIA request was filed, Brig. Gen. Lyle Barker Jr., acting chief of public affairs for the Army, denied the newsman's request. Barker said the release of after action reports would breach agency ethics. He wrote Taylor to explain the rejection:

> It would be in violation of the professional ethical standards which the Army has long maintained in its relations with news media representatives. Although unwritten, it has long been our policy that the efforts of one newsman in his or her reporting of the Army shall be considered exclusive property. To do otherwise would be a totally unwarranted breach of confidentiality. I am sure that you would be un-

Summary

Investigative reporter Jack Taylor's requests for after action reports were not only opposed by the Pentagon, they also caused a rift between the Pentagon press corps and outside reporters over the issue of access to summaries of interviews between reporters and Pentagon officials.

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> willing for any Army public affairs officer to reveal to your competition the story line you pursued and the information you were provided during one of your visits to an Army activity.

The Army claimed that its after action reports qualified under the fifth exemption to the FOIA — agency memoranda — and therefore did not have to be released to inquisitive reporters.

Taylor was unconvinced.

Known as the most prolific practitioner of the FOIA request, Taylor has filed more than 2,500 requests with 50 agencies over a 10-year period. That's an average of one request every working day for the decade.

He immediately sent an FOIA appeal to Brig. Gen. Barker. He also filed new FOIA requests with the other three military services — Air Force, Navy and Marine Corps — as well with the Army and Air National Guard Bureau and the Department of Defense.

Critics — both in the military and the press corps covering the Pentagon — later were to disparage Taylor's effort as a "fishing expedition" because the newsman had requested every tape, letter and other scrap of data the military had concerning its dealings with the Pentagon press corps.

BATTLE WITHIN THE RANKS

While Taylor waited for the Pentagon agencies to respond, a battle ensued within the ranks of the press corps. Taylor's action was greeted unfavorably by some members of the press assigned to the Pentagon. They contended Taylor's efforts to obtain after action reports would allow one reporter to spy on another reporter's work in progress. Their ire, in fact, spilled over into the press itself. Popular periodicals and professional journals carried stories on the controversy as it raged for the first months of 1981.

Some of the Pentagon press corps' dissatisfaction erupted when the military made Taylor's FOIA requests widely known. Early in the battle, Darrell Peck, a lawyer with the Army's Office of General Counsel, acknowledged that "it's difficult to find an exemption in the FOI Act to deny the request, so we're contacting members of the press to try to get Mr. Taylor to drop his request."[3]

Another Pentagon official, Lt. Col. Michael Vargosko, chief of the Army's Public Information Division, admitted he had contacted members of the press to pressure Taylor. "They're up in arms as I hoped they would be. . . . I think it's great that the Army and the press are working together on this," he told a **Wall Street Journal** reporter.[4]

Vargosko's story changed somewhat in other published accounts. He denied that the Army had meant to incite the press corps. He explained that when Tim Hatch of the General Counsel's office was gathering background information before making a recommendation on Taylor's appeal, he had urged Hatch to talk with some Pentagon reporters to get their feelings on the matter.

"My goal was to give Hatch another viewpoint. We didn't want him to make a recommendation unless he got to speak to reporters himself. I selected the reporters out of the hallway, at random," Vargosko said.

Vargosko was a strong advocate of protecting the confidentiality of after action reports. "Put yourself in a reporter's place," he said. "He spends months gathering information for a story and before it's even printed someone else can come in and ask for all the information he gathered." Vargosko defended the after action reporting practice as "a service to the news media" to make certain the right information is given.[5]

None of this satisfied Taylor.

"The Army's public affairs people decided to try to get the Pentagon press corps up in arms — to put pressure on me to drop my appeal — to back off my request," Taylor said. Describing the Pentagon and the correspondents who objected to his FOIA requests as "an unholy and odd alliance between the Army and the press that covers it," he said such tactics by the Army only made him more adamant about obtaining the after action reports.[6]

The dilemma facing journalists was duly noted by **Federal Times** columnist Sheila Hershow, who wrote in a Jan. 12, 1981, article, "It is seldom that I find an issue I can come down squarely on both sides of. But that's what I found." Hershow also shone some light on the practice of after action reporting:

> As a reporter on the federal beat, I am too well aware of the bureaucratic practice of assigning public affairs officers to sit in on the interviews with agency officials. At best, this watcher sits silently, scribbling notes. At worst, he interrupts answers, tries to overrule questions, and engages in a time-devouring, happy-talk dialogue with the interview subjects, a duet of praise for the agency and all its programs. Some federal chieftains argue that the public affairs monitors prevent the spread of misinformation by immediately correcting any inadvertent error a nervous agency decision maker might utter under a rapid-fire barrage of questions. Others argue that without a witness, a federal official has no defense against an unscrupulous or incompetent reporter who misquotes him. To most reporters, however, these bureaucratic babysitters hinder the flow of information rather than aid it. Their presence intimidates interview subjects who might otherwise be candid while it protects agency whitewash artists.

Hershow suggested that Taylor, no doubt, was hoping that the after action reports would reveal favortism and even incest between the Pentagon and the press, as well as "dealing, double-dealing, deliberate leaks, deliberate lies and other unsavory ploys used by both sides. The manipulation of the press by the government and the government by the press is a matter of legitimate journalistic concern."[7]

Not all Pentagon reporters shared those views. One of the most outspoken critics of Taylor's action was John Fialka, a Pentagon reporter for the Washington **Star**. He charged that

Taylor's FOIA requests, if successful, would allow "one reporter to ferret out the work product of another reporter." It would mean, Fialka said, that one reporter could "pickpocket" another reporter's work.[8]

As the battle grew in intensity, Fialka made explicit his charges in a published letter to the editor of the Washington **Post**:

> Until now, those materials have been made protected as a matter of custom: journalistic ethics, if you will. The public affairs office never discloses the contents of a reporter's interview before the reporter has had a chance to use the material in it. And, until now, reporters have generally refrained from using the legal processes to spy on each other. In an age when issues become ever more complex and difficult to explain, the Taylor precedent would set a new deadline for reporters. It takes about three weeks for an FOIA request to be processed. If it takes longer than that for the substance of an interview to be verified and published, the reporter and his publisher will face a real risk of being beaten on their own story. Good stories take time.[9]

Citing the "bizarre prospect of the (Freedom of Information) Act being used to help one reporter spy on another," George Wilson, Pentagon correspondent for the Washington **Post**, agreed, although reluctantly, with Fialka. Wilson acknowledged that he wrote a story for the **Post** about Taylor's requests as part of a "frontal assault" to prevent disclosure of the after action documents.[10]

Fialka and Wilson were joined by another Pentagon reporter, Walter S. Mossberg of the **Wall Street Journal**, in lodging an objection to Taylor's requests with the Washington-based Reporters Committee for Freedom of the Press. Mossberg called Taylor's requests "absolutely wrong and unethical." He noted that, "at a time when reporters are going to jail to protect sources and contents of interviews, the Reporters Committee should vigorously protest the release of records which potentially reveal the same thing."[11]

Meanwhile, Taylor shored up his defense of the FOIA requests. He solicited support from the Reporter's Committee and Investigative Reporters and Editors. He should have access to the after action reports, Taylor told the organizations, for a reason he said was "quite simple":

> The documents are government reports prepared by a federal agency for its own purposes; are very similar to other government reports many reporters and the Reporters Committee itself have long fought to release, and are subject to public release under the law just as any other government document. For the press to claim an exclusion simply because they involve the press is both presumptious and hypocritical. Who are we to demand an exemption from the law we are unwilling to grant anyone else?

In addition to being "hypocrisy of the first magnitude," Taylor argued that the Army routinely disseminates the sort of information he was requesting. In his appeal, he said the Army's newsletters listed stories being prepared by various publications. He noted one example: "**Newsweek** correspondents visited Fort Campbell and Fort Stewart as part of a major story on readiness. (They) focused on issues such as personnel, equipment maintenance and training efficiency."

The intensity of feelings and words between Taylor and Fialka escalated, as evidenced in a January, 1981, article in **Editor & Publisher** magazine. In that article, Fialka charged Taylor with having a confict of interest. He said Taylor had neglected to make it known publicly that although he has reported on the military, he is a Major in the Army Reserve, works two weeks a year in the Pentagon and has a security clearance and deals with classified Army documents. "For Taylor to be picturing himself as an outsider battling against the Army and the Pentagon press corps is ludicrous," Fialka said. "It's Jack Taylor who has the conflict. I've talked to him and he insists he can take off one hat and wear the other. But he is being paid by the Army."[12]

Taylor rejected the conflict of interest charge. He argued that, although he indeed had an Army Reserve commission, he had written investigative articles critical of the Army. "Can a journalist not write about the media because he is a journalist?" Taylor asked. Furthermore, he said, his annual active duty assignments were at the Pentagon's Command Information Office of Public Affairs and not in the Public Information Office that handles the after action reports.[13]

Caught in the crossfire were the Reporters Committee for Freedom of the Press and IRE. As the controversy brewed, both organizations were being asked for support. It was a predicament they could not wish away.

Jack Landau, Washington correspondent for Newhouse Newspapers and head of the Reporters Committee, acknowledged there were "two absolutely polar points of view" being debated.[14]

Worse, he said, was the timing of the affair. The debate within the ranks of reporters boiled over when the Freedom of Information Act, one of their most effective investigative tools, was under increasing attack in Congress. "Just when the press ought to be able to be together supporting the (FOI) act, you have two groups of very respected reporters at each other's throats," Landau lamented.[15]

The fight appeared to be splitting reporters into two warring camps. Landau noted that Taylor was trying to rally support from investigative reporters, while Fialka sought assistance from Pentagon reporters. "It obviously will not do the press any good to have two well established groups of journalists feuding among themselves over FOI."

Landau tried to arrange a meeting between Taylor and Fialka to resolve their differences. He was unsuccessful.[16]

The war of words was heightened further when Taylor, a member of the steering committee of the Reporters Committee for Freedom of the Press, threatened to ask the committee to file suit to obtain the documents if his requests were turned down by the military. That prompted a widely publicized remark from Landau: "I'd just like to get some Valium and get out of town."[17]

Although Uhrhammer of the IRE sided with Taylor, he directed his criticism to the after action reporting practice.

"Personally, I find that Pentagon practice onerous and very deserving of an early demise," he said. Noting a wrinkle in the FOI Act, Uhrhammer offered a legal argument against the military practice. He said privacy provisions in the act prohibit federal agencies from maintaining records describing how an individual exercises his or her rights under the First Amendment, unless it is done under the authorization of a statute or within the scope of an authorized law enforcement agency. Therefore, he suggested, Pentagon agencies cannot maintain records on how certain individuals exercise their constitutional rights — in this instance, agencies cannot maintain after action documents on reporters who were asking questions of officials.[18]

On Feb. 19, 1981, the IRE executive board issued a statement that promoted a compromise position.

> IRE is opposed to the monitoring of reporters' conversations with officials of any government department; and if this is done against our protest, they do it with knowledge that everything they do should be made public, and there be no exemption for records on reporters' conversations.

Two newspapers, the Army **Times** and **Today** of Brevard County, Fla., printed editorials on the dispute. Both suggested the Secretary of Defense should eliminate the requirement that a public affairs officer be present when a reporter interviews a military official. Such an action, the Army **Times** said, not only would resolve the issue at hand but would "eliminate a costly waste of military manpower and facilitate improved coverage of military affairs."[19]

Taylor never asked the Reporters Committee to file a lawsuit to test the Pentagon's contention that after action reports were exempt under the FOIA. That organization never reached a consensus on the Taylor episode.

By spring 1981, as the Pentagon began issuing new directives about its after action reporting policy and Taylor began receiving some of the materials he had requested, the controversy quieted down as quickly as it had developed.

WHAT TAYLOR WANTED FROM THE PENTAGON

Taylor's FOIA requests for after action reports, as well as his subsequent appeals, began with a familiar introduction: "Your attention is invited to the Freedom of Information Act (5 U.S.C. 552), as amended, and to implementing Department of Defense instructions and regulations. . . ." Taylor made an 11-part request to each military agency on Jan. 13, 1981. In most instances, he asked for the following items the agencies had compiled since Sept. 1, 1980:

1. The agency's after action reports.
2. Transcripts of tape-recorded interviews or notes.
3. Fact sheets or responses prepared because of media content.
4. Information requests to the agency from the media, or media queries.
5. List of news media representatives who regularly receive agency press releases.
6. List of periodicals the agency receives.
7. Lists of senior civilian and military personnel who have visited newspaper editorial boards.
8. Speeches and addresses given by military public affairs chiefs since Dec. 1, 1980.
9. Lists of the "most positive," "most negative" and "turned-around/defused" stories reported by the media during the past year.
10. Memos, correspondence and other documentation pertaining to communications by the military designed to turn around or defuse major news media stories categorized as negative for the past two years.
11. Memoranda reflecting public affairs summaries prepared for the agency about public affairs activities for the past year.

In most cases, the military agencies told Taylor a time extension was needed "for consultation. . . with another agency having a substantial interest in the determination of the request." By the end of January 1981, Taylor began receiving some of the Pentagon paperwork he had requested.

The replies, however, were not complete.

And, furthermore, the military made an about face, now claiming the fourth exemption instead of the fifth — internal agency memoranda.

Much of the material Taylor wanted was considered by the Pentagon to be non-disclosable under the fourth FOIA exemption — trade secrets — because it contained "materials which would prejudice the legitimate commercial rights of the news media to stories they are still pursuing." In addition, charges for copying and releasing the material were included. One Air Force reply alone brought a charge of more than $1,000 in fees.

What Taylor did not receive was the core of his original request, the after action reports.

TAYLOR V. AIR FORCE

As Taylor sent off new FOIA appeals protesting both the withholding of requested information and the exhorbitant fees, he focused his attention on one agency, the Air Force. Taylor's correspondence with the Air Force in early 1981 demonstrates the form and theme the reporter used to wrest information about the agency's public affairs programs and policies.

Taylor received a letter from the Air Force's office for Plans and Resources (Office of Public Affairs) in early February 1981. The letter said portions of approximately 130 pages of requested information were exempt from disclosure.

> This information is either personal material such as Social Security and home telephone numbers. . . or information which would prejudice the legitimate commercial rights of the news media to stories they are still pursuing. We did not inventory the notes requested. . . (because) they are not considered Air Force records. Such notes are for the personal use of the action officer who made them.

On Feb. 25, 1981, Taylor wrote a 10-page letter of protest to Vernon Orr, secretary of the Air Force. Taylor wrote:

> . . . (T)he initial denial authorities contended that certain information was being withheld under 552(b)(4) because it contains material which would prejudice the legitimate commercial rights of the news media to stories they are still pursuing, apparently considering such information to qualify as 'trade secrets and commercial or financial information obtained from a person and privileged or confidential,' as specifically defined in the Act. The leading case in that area is **National Parks and Conservation Association v. Morton**, 498 F.2d 765 (D.C. Cir. 1974), which held that in order to reach a conclusion to withhold, information must: (1) be obtained from a person, (2) contain commercial information, and (3) be confidential. The case further defined confidential as likely to (1) impair the government's ability to obtain unnecessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. None of the prerequisites as defined above applies to the types of documents at issue.

In effect, Taylor charged the Air Force had used "two completely divergent, mutually exclusive approaches" to reach its decision to withhold. Taylor challenged the first point:

> The information was not obtained from a person in the sense that the Air Force solicited the information, as in the case of a procurement contract; it does not contain commercial information, and it certainly is not confidential. The only information obtained from a news media representative is his questions. The determinative question here is whether or not the questions are commercial information under the Act. They are not. They have a value to a commercial enterprise, namely the news media organizations, but they are not themselves commercial information. The only thing arguably commercial in this instance is that the Air Force provided answers, but they come from the Air Force, not a person, as defined by law.

As to the second approach, Taylor argued:

> The information is not a trade secret, which is normally defined as a formula, pattern or device, or compilation of information used in one's business, because to be a trade secret it has to be kept secret. In this case it clearly is not and does not qualify to be treated as such.

Furthermore, Taylor wrote, the requested information could not be confidential, for otherwise the Air Force would have had it classified. He noted that:

> To withhold information as 'commercial or financial information' exempt from disclosure, the government must be able to prove the information is 'confidential.' Courts have held that such information is 'confidential' only if its disclosure would (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.

Taylor concluded that such strict tests require the government to show more than just a likelihood some embarrassment or commercial loss might result to a business firm if its records are disclosed. Such documents, he said, "are generated by the Air Force for the Air Force's own purposes," and the Freedom of Information Act and its case law make it clear government-generated information cannot be considered "obtained from a person." Rather, Taylor said, the fourth exemption is limited to material obtained from non-government sources, "consequently, it has no applicability here."

Taylor further argued the public's interest in public affairs activities of the military is clearly recorded. To argue otherwise, he said, would place the Air Force in the position of making value judgments on behalf of newspapers insofar as what is considered newsworthy and in the readers' best interests. He defended his original objective — to take a penetrating look at the military public affairs policies, practices and relationships — as being in the public interest.

Taylor, citing information earlier received through an FOIA request, cited the magnitude of the Air Force's 1979 public affairs activities as proof of its public interest value. That year, he noted, there were:

- 4,000 active and reserve component full-and part-time public affairs personnel generating 45,000 headquarters and unit news releases,
- 6,000 interviews with the news media,
- 3,200 briefings or news conferences,
- 615,000 hometown news releases,
- 18,000 base tours by 500,000 visitors,
- 48,000 civilian inquiries answered,
- 500 news media orientation flights and 200 community leaders orientation flights,
- 11,000 speeches,
- 100 base open houses attracting more than 9 million people, and
- 50 meetings with media editorial boards.[20]

Taylor attached additional evidence to support his request for after action reports, which he argued were Air Force

public affairs documents. He attached affidavits from 11 prominent newspaper reporters who testified to the value of "research into the military's public affairs policies, practices and relationships with the news media now being conducted by Mr. Jack Taylor Jr." These statements were signed by such nationally known newsmen as Jim Polk, Washington reporter for **NBC News**; Bill Farr, Los Angeles **Times** reporter; and Clark Mollenhoff, professor of journalism and law at Washington and Lee University. They all said the material sought by Taylor would be of "significant interest to the public."

To document that the matter was of public interest, Taylor cited 15 articles that had appeared in the press about his FOIA requests for the after action reports and the ensuing debate. The articles appeared in such publications as the Washington **Post**, **Newsweek**, Army **Times** and the Pentagon's **Current News** newsletter. This, he wrote, is "clear and compelling evidence that the very subject encompassed by the records at issue is of tremendous public interest since there has been considerable news media reportage on simply our attempts to obtain some of the records."

By February 1981, Taylor had received some of the materials he had requested from the Air Force. The materials included copies of summaries of public affairs activities, military information practices, speeches, the transcription (excerpts) of an interview between TV reporter Mike Wallace of "Sixty Minutes" and a pilot, miscellaneous notes by public affairs officers, phone requests from journalists and advisories from the Pentagon Telecommunications Center on such matters as interviews, military travel for journalists and reporters' visits to bases. In most of the advisories appeared the line, "Request you provide after action report within 48 hours of visit."

There were no after action reports included in the material released to Taylor.

WHAT THE PENTAGON RELEASED

In addition to the Air Force paperwork, packets of information came in from the Army, Navy, Marines Corps, National Guard Bureau and the Office of the Assistant Secretary of Defense. Although each supplied Taylor with copies of its public affairs reports and messages of a similar nature, there was a distinctly different form and format used at each agency.

The Army supplied Taylor with copies of its "Information Report" that were in the 1980 files he had requested. These were forms that recorded media inquiries, usually made by telephone. The report identified the reporter, his or her organization, the reporter's question, the Army's answer (usually brief) and the route the request followed in the agency.

Some of the reports Taylor received were censored. The reporter's name and organization, as well as the question and answer, all were clipped out of the form. In addition, a heavy degree of editing by agency commanders was noticeable. For example, if the questions could be answered simply by a "yes" or a "no," the commander sometimes corrected the officer or specialist to answer that way. Explanation or background that may have been included was eliminated during the editing process.

Just as the Army supplied Taylor with its "Infomation Report" files, the Navy and Marine Corps released copies of their "Media Query," while the National Guard Bureau released copies of its "Query Sheet."

One such Navy media query was dated March 26, 1981. It was from Jack Taylor of the **Daily Oklahoman**. It said:

> SUBJ: After Action Reports with Newsmen.
> Q1. How has the Navy interpreted and acted on a 19 March memorandum from the Secretary of Defense, dated 19 March, for the Secretaries of the military deapartments;
> Subject: After action reports of interviews with newsmen.
> A: As the Navy has never had a requirement for after action reports of interviews with newsmen, there is no interpretation of action required.

Other miscellaneous materials were released by Pentagon agencies. They included speeches, military advisories of visits to installations and travel plans for journalists, photography requests, clippings from newspapers and magazines, and general correspondence between journalists and Pentagon agency officials.

In all, Taylor wound up with approximately 6,000 sheets of paper from the files of Pentagon public affairs agencies. The material weighed more than 50 pounds. The total cost in fees charged amounted to about $1,500.

Taylor still had received no after action reports.

Finally, in late August 1981, Taylor received a letter from Milton H. Hamilton, administrative assistant to the Secretary of the Army. It said "copies of transcripts of tape-recorded interviews and after action reports of interviews in response to your request (of Jan. 9, 1981)" would be forthcoming. Shortly after that, Taylor received 10 official "Interview Reports," copies of nine interviews that had been taped and transcribed, and about 30 Pentagon Telecommunications Center messages that summarized interviews and visits by journalists.

Several of the transcribed interviews, including one with Washington **Star** reporter John Fialka, who had moved to stop Taylor from obtaining the after action reports, had been heavily censored. The Fialka interview with Gen. Edward C. Meyer, Army chief of staff, had been scissored. Nearly half of the transcript's 27 pages were trimmed. Most of the missing sections were the general's answers to Fialka's questions.

Taylor immediately sent an FOIA appeal to Secretary of the Army John O. Marsh challenging the agency on its decision to withhold portions of the after action reports. Taylor wrote:

> . . . (S)uch withholding appears to be arbitrary and capricious (e.g, a transcript of an interview on 25 August 1980 between John Fialka of the Washington **Star** and the Army Chief of Staff contains censored portions when in fact the Washington **Star** no longer exists and did not exist at the time of the withholding.)

It was the end of the line for Taylor's appeals. A lawsuit remained as the only course of action left, and Taylor decided against that.

PENTAGON MAKES A POLICY CHANGE

Taylor's use of the FOI Act to obtain after action reports and other public affairs materials resulted in a top-level memorandum that was issued March 19, 1981. In the memo, which was directed to the secretaries of all military departments, Secretary of Defense Caspar Weinberger succinctly commanded:

> Subject: "After Action Reports" of Interviews with Newsmen.
> Written reports of interviews with newsmen, which constitute a record subject to Freedom of Information requests, will no longer be required. [21]

In another piece of correspondence that day, Weinberger wrote to Walter E. Diercks, chief lawyer of the Washington **Star**, and reiterated the directive. "As a matter of interest," Weinberger said, "you should be aware that I have discontinued the requirement to prepare the so-called 'After Action Reports.' "[22]

On April 2, 1981, William H. Taft IV, general counsel for the assistant secretary of defense for public affairs sent Diercks a clarification. The **Star**, apparently concerned about whether reporter Fialka might be compromised by the release of after action reports, was told by Taft:

> Whether these reports continue to be prepared or whether Department officials prepare other records of meetings with members of the press is now within the discretion of the separate Defense Agencies and Military Departments. With respect to such material as may be developed about contracts (sic) with the press, it is difficult at this time, without knowing the sort of information it might contain, to anticipate the extent to which it may have to be made available pursuant to a request under the Freedom of Information Act. In the circumstance, it seems best to await the presentation of a specific request for a specific record rather than making commitments that may not, in the end, prove to be consistent with the requirements of the Act.

Taft assured Diercks that if there were an FOIA request to obtain after action reports involving Fialka, the Pentagon agency involved would alert that reporter. Taft wrote:

> While the (FOI) Act does, of course, establish tight time constraints, it will be our practice, both upon receipt of a request for a record of a press contact and also in advance of any actual proposed release where, in our judgment, such release is required, to notify the reporter involved. This is consistent with the procedures required by the Freedom of Information Act regulations of this Department.

Taft added that he hoped reporters would be alerted by newspaper management of the new policy. Reporters, he said, should "in any event they object to any proposed release, take whatever steps they may feel are appropriate." [23]

Nearly three months later, on June 22, 1981, the Office of the Assistant Secretary of Defense issued a memorandum about the release of records under provisions of the FOIA. The memo spelled out what could and could not be considered disclosable material, and set down some new policies that had been issued by the secretary of defense. The new rules were:

- If the Department of Defense was required to release any records concerning contacts with any member of the press, it would notify the reporter involved in advance of any actual proposed release of the record. Such records likely would be denied under the "trade secrets" exemption of the FOI Act.
- Records of the summaries of reporters' interviews are not limited to written memoranda but include audio and audio-visual tapes. If such tapes are made available to other staff members or placed in a functional file, they would be subject to FOIA provisions.
- Tapes are included under provisions of agency regulations.
- Press inquiry sheets, or media query or information reports that are completed and placed in functional files of the agency, are subject to FOIA provisions. These usually are phone requests from the media. Prior to the release of any such information, however, "a close review is required to insure all information is excised that may result in a clearly unwarranted invasion of privacy or may provide proprietary data, cause competitive harm or reveal trade secrets." All such information considered to be "trade secrets" or dealing with "law enforcement investigations" may legitimately be withheld, although names of requesters are not considered a legitimate exemption if an investigation is requested.
- Notes regarding press inquiries maintained by an after action officer at his desk and used only for personal use are not considered a record under the provisions, and are not subject to release under the FOI Act.
- Memos and tapes (transcripts) made of any backgrounder that are placed in functional files "of the office of the principal giving the briefing or office files of the public affairs or action officer monitoring the briefing" are subject to FOIA provisions. (This would suggest that files other than those of the "principal giving the briefing" would not be affected.)
- Tapes or memos of backgrounders made for the personal use of the action officer or the principal, and maintained in either person's desk, are not considered a record under De-

fense Department regulations and not are subject to FOIA provisions.

- Public affairs personnel are encouraged to work closely with their legal counselors "early in the decision-making process when processing FOIA requests asking for copies of After Action Reports, press inquiry sheets and transcripts of backgrounders."
- If "substantive issues" are raised during processing an FOIA request, an agency should contact the Office of Public Affairs.[24]

The memorandum, mailed along with enclosures to 11 Pentagon agencies, was signed by Assistant Secretary of Defense Charles W. Hinkle, who is director of Freedom of Information and Security Review for the Office of Public Affairs. Interestingly, it was Hinkle who wrote to Taylor on Dec. 31, 1980, informing him that "There are no records responsive to your request since it is not the practice of the Assistant Secretary of Defense (Public Affairs) to solicit After Action Report or similar documents."

Hinkle's office oversees public affairs policy for Freedom of Information Managers for the military services, the National Security Agency and the Defense Nuclear Agency.

The after action reporting practice still flourishes, according to Lt. Col. Michael H. Clark of the Army's Public Affairs Department. Clark estimated that a public affairs officer sits in on press interviews "at least 90 percent of the time." Of course, Clark pointed out, a news reporter usually agrees to the practice prior to the interview, which often is taped while the public affairs officer takes notes. The officer is there "to debrief or refresh the mind of the interviewee or the reporter," according to Clark.

He said the "end result of the Taylor situation is that very little has changed, if any." The reports, he added, remain confidential.

Clark's estimate appears to hold. In an FOIA request filed March 18, 1983, for Air Force after action reports compiled at the Pentagon since Jan. 1, 1983, the response from Air Force Freedom of Information Manager Anne W. Turner was: "The records requested are exempt from disclosure because they include reporters' proprietary information which, if published, could reveal trade secrets."[25]

A FOOTNOTE ON JACK TAYLOR

For Taylor, the episode provided both irony and a degree of abuse for his efforts to wrest after action reports from the Pentagon. Although he managed to obtain a small mountain of information through his requests and appeals, none of it was read by Taylor. Because of the controversy within the ranks of journalists, time delays wrought by the Pentagon bureaucracy and the limited number of after action reports actually received intact, Taylor abandoned the research he had planned to present at the IRE conference.

Taylor said he believes that his 1980 articles critical of military preparedness and his attempt to obtain the after action reports may have contributed to his prevalent "troublemaker" image among Pentagon brass. By mid 1981, Taylor learned that an FBI espionage investigation of him was being conducted. He subsequently discovered he was being reassigned from his Army Reserve public affairs job at the Pentagon — where he spent two weeks of active duty annually — to a regular Army combat armored division. Taylor protested the FBI investigation and the Army reassignment to the secretary of the Army. Both, he charged, smacked of harassment. After delivering formal testimony on his behalf, Taylor had his case upheld by the secretary. But Taylor decided the wound between himself and the Army may have been cut too deeply. In September 1981, he resigned his Reserve commission.

1. Jack Taylor, reporter for the Denver Post, telephone interview, April 7, 1983.
2. John Consoli, "Reporters Feud Over Issuance of Army Data," **Editor & Publisher**, Jan. 3, 1981, p. 28a.
3. Jim Drinkhall, "Army, Press Ally to Keep Records Secret," **The Wall Street Journal**, Jan. 6, 1981, p. 33.
4. **Ibid.**
5. Consoli, p. 40.
6. Consoli, p. 28a.
7. Sheila Hershow, "Reporter v. Reporter on the Federal Beat," **Federal Times**, Jan. 12, 1981.
8. Drinkhall, p. 13.
9. John Fialka, reporter for the Washington Star, Letters to the Editor, **The Washington Post**, March 23, 1981.
10. Drinkhall, p. 33.
11. **Ibid.**
12. John Consoli, "Investigative Reporters Continue Their Feud," **Editor & Publisher**, Jan. 27, 1981, p. 24.
13. **Ibid.**
14. Consoli, Jan. 3, 1981, p. 28a.
15. **Newsweek**, Jan. 26, 1981, p. 81.
16. Consoli, Jan. 3, 1981, p. 28a.
17. Drinkhall, p. 38.
18. Ken Fuson, "Dueling Scribes," IRE Journal, Winter 1981.
19. Editorial, "Odd Man Out, **Army Times**, Jan. 19, 1981, and Editorial, "Freedom of Information," **Today** (Brevard County Fla.), Dec. 29, 1980.
20. H. Dalton Jr., Department of Public Affairs, U.S. Air Force, "Public Affairs Summary 1979 — Information Memorandum," March 11, 1980.
21. Caspar Weinberger memorandum, March 19, 1981, obtained by FOIA request, March 18, 1983.
22. Weinberger letter to Walter E. Diercks of Washington Star, March 19, 1981, obtained by FOIA request, March 18, 1983.
23. William H. Taft IV letter to Diercks, April 2, 1981, obtained by FOIA request, March 18, 1983.
24. Charles W. Hinkle, "Memorandum for Release of Records Under the Provisions of the Freedom of Information Act," June 22, 1981, obtained by FOIA request, March 18, 1983.
25. Anne E. Turner letter, April 13, 1983, obtained by FOIA request, march 18, 1983.

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